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Supreme Court of the United States

October Term, 1961

No. ~~778~~ 79

VIRGIL A. WOOD, WILLIAM W. ROBERTS, BATES HUTSON FORD, ESSIE E. GORDON, WILLIAM G. ROBERTS, RALPH REAVIS, JAMES A. TUCKER, ELIJAH J. REGULUS, JON E. CRAWFORD, LANKSFORD E. HANKINS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Virginia Supreme Court of Appeals entered on October 12, 1961 affirming the judgment of the Corporation Court of the City of Lynchburg, Virginia, holding petitioners guilty of the crime of trespass.

Opinion Below

The Corporation Court of Lynchberg did not issue an opinion. The opinion of the Virginia Supreme Court of Appeals appears as Appendix "A" to this petition.

Jurisdiction

The judgment of the Virginia Supreme Court of Appeals was entered on October 12, 1961. On January 2, 1962, Mr. Justice Whittaker extended the time for filing this petition to and including March 8, 1962. The jurisdiction of this Court is based on 28 U. S. C. § 1257(3).

Questions Presented

1. Whether Virginia denied petitioners the equal protection of the laws by licensing a privately owned establishment to sell food to the public and acquiescing in and encouraging that establishment's refusal, in conformance with Virginia custom and policy, to serve petitioners and other Negroes at its lunch counter by reason of their race.

2. Whether Virginia's arrest and conviction of petitioners for trespass, as a result of their attempt to seek service at that establishment, constituted state enforcement of racial discrimination denying petitioners the equal protection of the laws.

3. Whether petitioners at their trial, were denied the equal protection of the laws and were deprived of their liberty and property without due process of law where:

(a) The race of each potential juror was marked on the jury list from which the jury which convicted petitioners was selected;

(b) Petitioners were refused the right to inquire of prospective jurors whether they belonged to organizations promoting or practicing racial hatred;

(c) Petitioners' trial was held in a segregated courtroom; and

(d) The trial judge demonstrated his bias by repeatedly and unwarrantedly rebuking defense

counsel and twice holding him in contempt as a result of counsel's diligent but courteous attempts to protect petitioners' constitutional and other rights.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment 14, Section 1:

> "No State • • • shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code of 1950, Section 18.1-173, as amended by Virginia Laws of 1960, Ch. 97:

> "If any person shall without authority of law go upon or remain upon the lands, *buildings* or premises of another, *or any part, portion or area thereof,* after having been forbidden to do so, *either orally or in writing,* by the owner, lessee, custodian or other person lawfully in charge *thereof,* or after having been forbidden to do so by a sign or signs posted on *such lands, buildings, premises or part, portion or area thereof* at a place or places where *it or* they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one *thousand* dollas or by confinement in jail not exceeding *twelve months,* or by both such fine and imprisonment.
>
> • • •
>
> *An emergency exists and this act is in force from its passage.* (Italics added; the portions italicized represent the 1960 Amendment.)

Statement of the Case

Petitioners are Negroes (all but two of them clergymen) who participated in sit-in demonstrations in Lynchburg, Virginia, on February 13, 1961 and February 21, 1961. Petitioners Gordon, William G. Roberts, Reavis, Tucker

and Regulus, were arrested in the morning of February 13th. Petitioners Crawford and Hankins were arrested in the afternoon of February 13th. Petitioners Wood, William W. Roberts and Ford were arrested in the afternoon of February 21st. The facts of each arrest are identical with minor variations not material to the case. The recitation of the facts will treat the events collectively.

Petitioners entered the premises of the Patterson Drug Company, a privately owned business establishment (T. 72).[1] At least three of the petitioners purchased articles for sale such as gum, candy, and cigarettes (T. 92-). They then seated themselves at the lunch counter (T. 67, 70), which was within the confines of the business premises open to the public (T. 65). The two petitioners arrested in the afternoon of February 13th sat at a lunch table in the same portion of the store (T. 70). Petitioners requested something to eat (T. 92, 93). On each occasion, William F. Patterson, Vice-President of the Patterson Drug Company (T. 65), told the petitioners that he declined to serve them and asked them to leave the store (T. 68-69, 70). When petitioners made no move to leave, Mr. Patterson called the police (*ibid.*).

On the arrival of the police, Mr. Patterson, in the presence of Capt. W. E. Gilliam of the Lynchburg Police Department, again instructed each of the petitioners to leave the premises (T. 42, 46, 48-49). Capt. Gilliam advised each of the petitioners that if they did not leave, they would be trespassers and liable to arrest (*ibid.*).

In each case, the petitioners were not dressed in any unusual way (T. 55, 62, 64) and were not disorderly (T. 55,

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[1] "T." refers to the transcript of the trial in the Corporation Court for the City of Lynchburg which is part of the record but contained in a separate binder. Consecutive references within the same parentheses refer chronologically to the three series of demonstrations.
"R." refers to the accompanying record.

63, 64), nor did they damage or destroy any property (T. 55, 63). Petitioners exhibited no animosity (T. 64), nor, indeed, did they speak at all (T. 55).

Having been asked to leave after being advised of the law, and refusing to leave, petitioners were arrested by Capt. Gilliam (T. 44, 47-48, 48-49).

All the petitioners are Negro (T. 93-94) and Mr. Patterson testified that it was for that reason alone he refused to serve them (T. 75-76).

Mr. Patterson testified that his store, which operates its lunch counter under a business license (T. 72), will generally serve any person who enters (T. 75). At the time of the demonstration, other persons were being served food at the lunch counter (T. 85-86). There are no signs in the store indicating that Negroes would not be served food (T. 81).

After petitioners were arrested, warrants were sworn out against each of them by Capt. Gilliam (T. 35). Petitioners were tried in the Corporation Court in the City of Lynchburg before a jury on April 5 and 6, 1961.

Petitioners were each found guilty of trespass and punishment was fixed at $100 fine and 90 days in jail for each (T. 124-126). The convictions were appealed to the Virginia Supreme Court of Appeals, and in a decision handed down on October 12, 1961, the convictions were affirmed (R. 17).

How the Federal Questions Were Raised

(a) The Federal questions relating to the first two questions presented in this petition were raised in the following manner:

1. Petitioners moved to dismiss the charges on the ground that § 18.1-173 of the Virginia Code was applied

in violation of the due process and equal protection clauses of the Fourteenth Amendment "solely to punish and coerce persons who are members of the so called 'Negro' race * * * who do not wish to observe and conform to private practices of racial segregation" (R. 4).

2. Petitioners moved to dismiss the charges on the ground that the arrests "occurred to enforce a private policy of racial segregation in the use of the facilities at Patterson's Drug Store which does business with the public at large * * * in contravention of the due process, equal protection and freedom of speech provisions of the United States Constitution" (R. 5).

3. Petitioners moved to dismiss the charges on the ground that "the statute is void as being one conceived in iniquity for the purpose of punishing those so called 'Negroes' who might not choose to observe certain community practices of racial segregation in various businesses open to the general public and to help preserve racial segregation of the so called 'Negro' throughout the State of Virginia" in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (R. 8).

(b) The federal questions relating to the third question presented in this petition were raised in the following manner:

1. As to the systematic exclusion of Negroes from the jury, an objection was raised first by a written challenge to the array (R. 10, T. 11) and pressed orally as a federal question before the trial judge on the ground that the designation by race of the jury list violated the due process and equal protection clauses of the Fourteenth Amendment (T. 12).

2. The question of the refusal of the trial court to allow prospective jurors to answer questions relating to membership in organizations committed to racial segregation

in Virginia was raised by the list of questions, submitted to the trial judge, which were to be propounded to the jurors (T. 20).

3. As to the segregated courtroom, the federal question was raised by a "Request for the Removal of Race Signs" expressly claimed to violate the Fourteenth Amendment (R. 3), and by a motion "To Abolish Racially Segregated Seating During Trial," claimed to violate the due process clause of the Fourteenth Amendment (R. 10, 11). The latter motion was also made orally before the trial judge (T. 14).

4. The constitutional question relating to the continuing bias and hostility of the trial judge which fatally infected the trial was raised in petitioners' "Request that Judge Disqualify Himself" (R. 12).

Exception to denial of all of the foregoing motions was properly noted (R. 9) and the motions were renewed at the close of the prosecution's case (T. 90), and again at the close of the defendants' case (T. 105). The grounds of the motions were asserted as the basis for a motion for a new trial (R. 13), and were assigned as error on appeal to the Virginia Supreme Court of Appeals (R. 15-16).

Reasons for Granting the Writ

A writ of certiorari should be granted in this case because its facts present what may well be the most important domestic public issue confronting our nation—the demand by the Negro population for first-class citizenship. The continued rejection of this demand by the officials of the Commonwealth of Virginia raises commanding issues of constitutional law which should be, but have not yet been, settled by this Court.

Petitioners contend that their convictions are unlawful and must be reversed because Virginia, from the first of its manifold involvements with this case to the last, has deprived them of their constitutional rights.

First, by licensing Patterson Drug Company and acquiescing in its adherence to the state custom of racial discrimination—indeed, by encouraging such discrimination—Virginia made the Company's refusal to serve petitioners its own, and thereby denied petitioners the equal protection of the laws.

Second, by arresting petitioners and convicting them of criminal trespass for seeking service at Patterson's lunch counter under "emergency" legislation enacted to preserve lunch counter segregation, Virginia used its full executive, legislative and judicial power to enforce the Company's racial discrimination, again denying petitioners the equal protection of the laws.

Finally, by trying petitioners before a jury selected from a list revealing the potential jurors' color, by denying petitioners the right to ask potential jurors whether they belonged to organizations advocating racial hatred, and by requiring petitioners to be tried in a segregated courtroom before a judge who repeatedly demonstrated his bias against petitioners and their counsel, Virginia again denied petitioners the equal protection of the laws and deprived them of their liberty and property without due process of law.

If petitioners had all been white rather than Negro, they would have been served at the lunch counter, they would never have been asked to leave, there would have been no arrests, and—even if they had been prosecuted—the features of the trial prejudicial to Negroes would never have affected them. Virginia therefore subjected petitioners to a long series of prejudicial disparities solely because of their race.

I

The Public And Licensed Character Of Patterson Drug Company And Virginia's Authorization And Encouragement Of Patterson's Racial Discrimination Made The Refusal Of Service To Petitioners State Action Which Deprived Them Of The Equal Protection Of The Laws.

If petitioners had a constitutional right to service at the lunch counter, their refusal to leave was lawful and the State was powerless to make their exercise of that right a criminal act. *Boynton* v. *Virginia*, 364 U. S. 454 (1960). While the Fourteenth Amendment erects no shield against purely private discrimination, *Civil Rights Cases*, 109 U. S. 3 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), petitioners had a constitutional right to be served because, under all the circumstances, Patterson's discrimination against them was imputable to the State.

It is now well settled in cases of this character that the private ownership of the establishment is not controlling and that the "property rights" of the owners are not absolute. As this Court said in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506 (1946):

> "• • • the corporation's property interests [do not] settle the question. The State urges in effect that the Corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[2]

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[2] See also: *State* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2360-62 (Baltimore Crim. Ct. 1959); *Freeman* v. *Retail Clerks Union*, 45 Lab. Rel. Ref. Man. 2234, 2342 (Wash. Super. Ct. 1959); *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277 (Magis. Ct. 1948). Compare *Republic Aviation Inc.* v. *N. L. R. B.*, 324 U. S. 793 (1946).

The privilege of "opening its property for use by the public in general" was conferred on the Patterson Drug Company by the State. In Virginia, as in Louisiana, restaurants, whether in a drug store, department store, or bus terminal, are a part of the public life of the community —a form of private property affected with a public interest. *Garner* v. *Louisiana*, 368 U. S. 157, 177, 181 (1961) (Douglas, J. concurring). They are subject to state regulation, and Patterson Drug Company in fact operated under a business license (T. 72). This license, as Mr. Justice Douglas pointed out in *Garner*, was derived from the public. Since Negroes are as much a part of the public as whites, a license to establish a public facility necessarily imparts, in law, equality of use for all members of the public.[3]

Virginia Code, Sec. 18-327 requires segregation of the races in places of public entertainment and assembly. This statute has been held to apply to restaurants. *Nash* v. *Air Terminal Services*, 85 F. Supp. 545, 548 (E. D. Va. 1949), *Air Terminal Services* v. *Rentzel*, 81 F. Supp. 611 (E. D. Va. 1949). State officials over the years have publicly stated that racial segregation in eating places is required by Virginia law. Washington Post, June 24, 1960, p. A. 1; *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 840 (D. C. Cir. 1961). Where otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer. *Baldwin* v. *Morgan*, 251 F. 2d 780, 787-89 (5th Cir. 1958); *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, 753 (4th Cir. 1955), *appeal dismissed* 351 U. S. 901 (1956). If Patterson Drug Company acted pursuant to a requirement of state law, or pursuant to what state officers represented to be state law

[3] *Garner* v. *Louisiana*, 368 U. S. at 184 (Douglas, J., concurring).

[Cf. *Monroe* v. *Pape*, 365 U. S. 167 (1961)], the presence of unconstitutional state action cannot be doubted.

But even if, as the Attorney General[4] of Virginia has now belatedly declared, restaurant segregation is not in terms required by State law, the requirement of state action is met by Virginia's affirmative authorization and encouragement of that policy. In *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), a municipality leased premises to a private establishment which allegedly practiced racial discrimination. This Court held that since the municipality could have forbidden discrimination in the lease, its failure to do so was in effect unconstitutional state inaction:

> "* * * [I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibility under the Fourteenth Amendment imposed on the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be * * * By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (365 U. S. at 725)

The concurring opinion of Mr. Justice Stewart and the dissents of Mr. Justice Harlan, (joined by Mr. Justice Whittaker) and of Mr. Justice Frankfurter, all agreed that a statute authorizing (as distinguished from requiring) discriminatory classification based exclusively on color would be "clearly" or "indubitably" unconstitutional. It follows from the various opinions in the *Burton* case that a State may be found to have violated the equal protection

[4] See appendix to *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d at 848-851.

clause not only where it affirmatively required racial discrimination, but also where the State authorized it or, by its inaction, permitted it to continue in an activity affected with a public interest.[5]

But Virginia has not restricted itself to mere tolerance of racial discrimination in licensed public facilities. By means of a long-standing and intransigent policy in favor of segregation of the races, the State has affirmatively committed itself to the preservation of a deep-seated custom [6] of racial segregation and has in effect served notice on the

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[5] See also *McCabe* v. *Atchison, T & SF Ry. Co.*, 235 U. S. 151 (1914) (State statute affirmatively permitting but not requiring railroads to provide unequal facilities to Negroes is invalid); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and "Private" Racial Discrimination*, 59 Mich. L. Rev. 993, 998, 1012 (1961), noting "a respectable amount of judicial authority for the proposition that state inaction or official nonfeasance can be regarded as state action," and "that affirmative state permission for private action can likewise be regarded as state action."

[6] This Court explicitly stated in the *Civil Rights Cases*, 109 U. S. 3, 25 (1883) that "private" discrimination is free of the interdictions of the Fourteenth Amendment only if "unsupported by state authority in the shape of laws, *customs*, or judicial or executive proceedings." (Emphasis supplied.) Shortly after the Fourteenth Amendment was adopted, Congress made deprivation of constitutional rights pursuant to any custom an actionable civil rights violation. See, e.g., Act of April 9, 1866, 14 Stat. 27; Act of May 31, 1870, 16 Stat. 141, 144; and Act of April 20, 1871, 17 Stat. 13, 42 U. S. C. A. § 1983. While the courts of the Fourth Circuit have taken the position that a State's acquiescence in a long-established custom of segregation does not constitute such state action as is barred by the Fourteenth Amendment [see *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4th Cir., 1959); *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 129 (D. Md. 1960), *aff'd per curiam*, 284 F. 2d 746 (4th Cir. 1960)], this view conflicts not only with the *Civil Rights Cases* but also with this Court's decision in *Burton* (which reversed a state court decision relying on *Williams* v. *Howard Johnson's Restaurant supra*), with Mr. Justice Douglas' concurrence in *Garner*, and with the Court of Appeals for the Fifth Circuit. *Baldwin* v. *Morgan*, 287 F. 2d 750, 759 (5th Cir. 1961).

lunch counter proprietor that if he chooses to serve Negroes, he will be challenging the uncompromising policy of the State.

That Virginia has a custom and policy of racial segregation is a "plain fact known to everyone" of which this Court may take judicial notice; to deny it is to raise an issue suggesting the "eerie atmosphere of never-never land." *Meredith* v. *Fair*, No. 19394, F. 2d , 30 U. S. L. Week 2347 (5th Cir. 1962). As its Supreme Court of Appeals said in *Hopkins* v. *City of Richmond*, 117 Va. 692, 86 S. E. 139, 145 (1915), it is the "declared policy of this state that association of the races tends to breach of the peace, unsanitary conditions, discomfort, immorality and disquiet." In 1955, the same court said: "that the preservation of racial integrity is the unquestioned policy of this state, and that it is sound and wholesome, cannot be gainsaid." *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d. 749, 752 (1955), vacated 350 U. S. 891 (1955). The Code of Virginia abounds with statutes [many of them patently unconstitutional; see *Bailey* v. *Patterson*, 30 U. S. L. Week 4164 (U. S. Feb. 26, 1962)] requiring segregation of the races in numerous walks of life.[7]

Virginia's support of racial segregation has survived the passage of time and has manifested itself in the State's opposition to every phase of the current struggle for desegregation. After this Court's landmark decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) had invalidated public school segregation,[8] the Virginia legislature responded with a package of "massive resistance"

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[7] §§18.1-356 and 18.1-357 (places of public entertainment or assembly); § 38.1-597 (fraternal organizations); § 53-42 (prisons); § 56-326 (air terminals), and § 20.54 (interracial marriage).

[8] Cf. Virginia Const. of 1902, Art. IX, § 140, as amended, which required segregation.

laws, some of which have been held unconstitutional. See *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1958) *app. dismissed*, 359 U. S. 1006 (1959). Cf. *NAACP* v. *Patty*, 159 F. Supp. 503 (E. D. Va. 1958), vacated sub nom. *Harrison* v. *NAACP*, 360 U. S. 167 (1959). When it became apparent that one of the leading forces in the fight for desegregation would be the NAACP, Virginia expressed its opposition to that organization's activities in a variety of ways. See, e.g., *NAACP* v. *Patty*, *supra*.[9]

The same pattern has marked Virginia's reaction to the sit-in demonstrators' challenge to segregated lunch counters. Within days of the launching of the lunch counter demonstrations,[10] the legislature, declaring that an emergency existed, passed three laws, all effective immediately, which changed the criminal trespass laws of Virginia to make them a far more formidable obstacle for the sit-in demonstrators.[11] While refusal to leave premises at the proprietor's request had been unlawful under prior law, the legislature, presumably aware that many merchants welcomed Negroes in all parts of their stores except at the lunch counters, made it unlawful to refuse to leave any portion of another's premises at the proprietor's request and expressly provided that such a request might be oral. The legislature also sharply increased the penalties for violation of the statute. In addition to these amendments, the legislature also passed two new laws, one prohibiting the solicitation and encouragement of another to commit trespass, and the second forbidding conspiracies and combinations to commit such crime.

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[9] See also, Scott, *Virginia Justice: If You Can't Get The Law, Get The Lawyer*, The Nation, January 20, 1962, p. 51, which relates the special harassment to which three of the counsel on this petition have been subjected by the Commonwealth of Virginia.

[10] See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L. Journal 315.

[11] Laws of Va., 1960, Ch. 97-99.

It is obvious from the timing and content of the legislation that the "emergency" to which the legislature referred was the challenge of the sit-in demonstrations to lunch-counter segregation. See *Meredith* v. *Fair, supra.* In the words of Virginia's Attorney General, the trespass legislation "protects the owner whose policy is to separate the races and who does in fact operate a segregated restaurant or other eating establishment." [12] The legislature has therefore plainly authorized discriminatory classification based exclusively on color. *Burton* v. *Wilmington Parking Authority, supra.* Without calling the 1960 measures segregation laws, (for to have done so would have assured their invalidation on constitutional grounds), Virginia adopted them in order to preserve its long tradition of segregation. As this Court recently declared in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347-348 (1960):

> "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114."

Since Virginia licensed Patterson Drug Company to serve only white patrons at its lunch counter, unequivocally took the side of the segregating licensee against the Negro seeking service, and did all it could to encourage the preservation of segregation, its role in the refusal of service to petitioners was so substantial as to constitute state action in violation of the Fourteenth Amendment.

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[12] See letter dated August 29, 1960 from Attorney General Harrison to the Commonwealth's Attorney for Roanoke, Virginia, which is appended to *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 848-851, at 851 (D. C. Cir. 1961).

II

The Removal Of Petitioners From The Lunch Counter And Their Arrest And Conviction Constituted State Enforcement Of Racial Discrimination In Violation Of The Equal Protection Clause.

The involvement of Virginia with Patterson Drug Company's racial policies did not end with its licensing and encouragement of that establishment to discriminate against Negroes pursuant to Virginia custom. Had Virginia been merely neutral towards segregation, it could have declined to interfere in the dispute between petitioners and the drug company and permitted the parties to that controversy to work out their dispute themselves by lawful means of persuasion and pressure. *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960). However, by arresting petitioners, compelling them to leave the lunch counter, and convicting them of criminal conduct, Virginia rejected any semblance of neutrality towards discrimination and chose instead to couple its encouragement of racial discrimination with active enforcement. Even if Patterson Drug Company's discrimination is "private", enforcement of that discrimination by the State violates the equal protection clause of the Fourteenth Amendment.

In *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), this Court, while recognizing that voluntary adherence by private individuals to racial restrictive covenants constituted "private" discrimination not subject to the Fourteenth Amendment, held that judicial enforcement of such private discrimination was unconstitutional state action. The action of a state court was held to be the action of the State; accordingly, the state court could not constitutionally prevent a Negro from occupying real property solely because of his race. While the racial discrimination was private in origin, this Court held that the Fourteenth Amendment was not "ineffective simply because the particular pattern of dis-

crimination, which the State has enforced, was defined initially by the terms of a private agreement." That the state courts stood ready to enforce such convenants against whites was immaterial because "equal protection of the laws is not achieved through the indiscriminate imposition of inequalities." This result did not invade the property rights of the parties to the covenant, because

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." 334 U. S. at 22.

The essential teaching of the *Shelley* decision, then, is that the State may not discriminate against an individual on racial grounds irrespective of the origin of that discrimination, and that any "right" of private discrimination is at most the right not to be punished for its practice, and does not carry with it any supplementary right to state enforcement of that discrimination. These principles, frequently reiterated and even expanded [13] since *Shelley*, are

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[13] *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957); *NAACP* v. *Alabama*, 357 U. S. 449, 463 (1958); *Valle* v. *Stengel*, 176 F. 2d 697 (3rd Cir. 1949); *Boman* v. *Morgan*, 4 Race Rel. L. Rep. 1027, 1032 (M. D. Ala. 1959), *aff'd sub. nom. Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960). In the *Boman* case, which involved a Negro's refusal to move to the rear of a privately owned bus, the District Court said:

> "* * * the police officers were without legal right to direct where they should sit because of their color. The seating arrangement was a matter between the Negroes and the Transit Company."

The Court of Appeals quoted this passage in support of its affirmance.

directly applicable to the case at bar.[14] For even conceding, *arguendo*, that the racial discrimination of Patterson Drug Company was private, state action was present in its enforcement, which in this case consisted of petitioners' removal and arrest by the police [*Monroe* v. *Pape*, 365 U. S. 167 (1961)] and of their prosecution and conviction in a Virginia Court, *Shelley* v. *Kraemer*, *supra*.

The applicability of the *Shelley* doctrine has been overlooked[15] or rejected with little or no analysis[16] by the various state courts which have upheld the constitutionality of the criminal convictions of the sit-in demonstrators. The opinions upholding these convictions have generally been based on one or more of the following grounds:

(1) The State trespass statutes are not racial segregation laws, but are "color blind," their sole purpose

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[14] For a more elaborate analysis of the applicability of the *Shelley* doctrine to the criminal prosecutions of sit-in demonstrators, see Schwelb: *The Sit-In Demonstration: Criminal Trespass or Constitutional Right*, 36 N. Y. U. L. Rev. 779, 796-800 (1961).

[15] *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958); *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S. E. 2d 817 (1961); *State* v. *Edwards*, — S. C. — 123 S. E. 2d 247 (S. C. 1961); *City of Greenville* v. *Petersen*, — S. C. — 122 S. E. 2d 826 (S. C. 1961); *State* v. *Goldfinch*, 241 La. 958, 132 So. 2d 860 (1961); *Walker* v. *State*, 103 Ga. App. 70, 118 S. E. 2d 284 (1961); *Briscoe* v. *State*, 341 S. W. 2d 432 (Tex. Crim. App. 1960).

[16] *State* v. *Avent*, 253 N. C. 580, 118 S. E. 2d 47 (1961); *Drews* v. *State*, 224 Md. 186, 167 A. 2d 341 (1961); *Griffin* v. *State*, 225 Md. 422, 171 A. 2d 717 (1961). Appeals or petitions for certiorari are now pending in the *Randolph*, *Avent*, *Drews* and *Griffin* cases and in a number of other similar decisions.

being "to protect people from trespass on their lands;"[17]

(2) The invalidation of trespass convictions of the sit-in demonstrators would interfere with a home owner's property rights and his right of a privacy;[18]

(3) Since the proprietor of a private establishment may use reasonable force to expel trespassers, it would be anomalous and would promote violence and anarchy to deny him the right to resort to the judicial process to do so.[19]

We deal with each of these propositions in turn.

(1) The color-blindness of Virginia's trespass statute on its face will not save it if it is unconstitutional as applied. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). In *Shelley* v. *Kraemer*, *supra*, Missouri's common law rule—that restrictive covenants were enforceable irrespective of whom they excluded—was also neutral on its face. Had a covenant forbidden sale of premises to a Caucasian, the state court would have enforced it just the same. But it was the holding in *Shelley* that even the application of this neutral rule was unconstitutional when invoked to enforce a covenant infected with racial discrimination. Where, at a specific lunch counter, or under a specific covenant, the State excludes or punishes a Negro where it would not exclude or punish a white man, the surface "neutrality" of its law is no more controlling than the "private" origin of the discrimination. Moreover, in the instant case, the circumstances under which the 1960 legislation was enacted indi-

[17] See *State* v. *Avent*, 118 S. E. 2d at 53; *Randolph* v. *Commonwealth*, 119 S. E. 2d at 819.

[18] *State* v. *Avent*, 118 S. E. 2d at 54; *Randolph* v. *Commonwealth*, at 119 S. E. 2d at 819-820.

[19] *State* v. *Avent*, 118 S. E. 2d at 55; *Randolph* v. *Commonwealth*, 119 S. E. 2d at 820; Note, 47 Va. L. Rev. 105, 120-121 (1961).

cate that even its apparent neutrality is illusory (See pp. 14-15, *supra*).

(2) Nor is there merit to the contention that reversal of these convictions would constitute interference with the right of a home owner, or even of the proprietor of a private club, to exclude unwanted guests. In the first place, the Patterson Drug Company is far more "public" than the home or club, for it invites the public to deal with it for commercial gain and is accordingly subject to state regulation, including regulation of its racial policies.[20] While a home owner's right to privacy in the use of his premises is of a very high order indeed, and subject to limitation only on a showing of extreme necessity, *Frank* v. *Maryland*, 359 U. S. 360 (1960); *Mapp* v. *Ohio*, 367 U. S. 643 (1961), the Patterson Drug Company was seeking trade, not privacy. The only property interest involved in this case is the asserted right of a licensed proprietor whose establishment is open to the public, including Negroes, to discriminate against Negroes in one small part of his store.

Moreover, the arrest and conviction for trespass of unwanted guests in a private home—even a home from which all Negroes are excluded—differs from this case in that it could not reasonably be termed state enforcement of racial discrimination. If a Negro enters a private home and refuses to leave, and is prosecuted by the State, he is being prosecuted as a trespasser and not as a Negro. There is in such a case no equivalence between Negroes as a class and trespassers as a class. Any white man who enters the home and who is not an invitee of the owner would similarly be prosecuted. The class of persons who would be prosecuted on refusal to leave includes most whites (i.e. all uninvited whites) and all Negroes. In the case of the Patterson Drug Company, however, all whites who dressed

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[20] See Greenberg, *Race Relations and American Law*, Appendix A, para. 6, pp. 375-379, for a collection of such anti-discrimination laws.

and behaved properly would have been served,[21] whereas all Negroes would have been asked to leave. A substantial identity existed between "trespassers" (the class ostensibly discriminated against) and "Negroes". Where what purports to be the State's legitimate discrimination against trespassers is in fact discrimination against Negroes, it is unconstitutional irrespective of its label. *Shelley* v. *Kraemer*, *supra*.[22]

(3) The "clincher" argument used by the State courts to uphold criminal convictions of the sit-ins—that to deny lunch counter proprietors state aid in excluding "trespassers" would encourage resort to self-help and lead to violence and anarchy—is also wide of the mark. It is settled that a state may not deny Negroes their constitutional rights on the pretext of avoiding violence, for it is the duty of the state both to protect those rights and to control violence. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Additionally, it is unlikely that a store proprietor would resort to self-help, for he seeks trade, not violence.

Moreover, resort to self-help is permissible only to enforce rights which the police may lawfully enforce—"in situations", as Dean Prosser has said, "where there is usually no time to resort to law." Prosser, *Torts*, 2d ed.

[21] Except, perhaps those accompanied by Negroes. A State's discrimination against Negroes does not, of course, become constitutional simply because the State also discriminates against whites who accompany Negroes.

[22] See Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right*, 36 N. Y. U. L. Rev. 779, 798-800 (1961), for a detailed discussion of the distinction between the instant situation and that presented by the arrest of a trespasser of an "all white" private club.

(1955), § 21, p. 92.[23] It follows that where the basic right—to have petitioners arrested—does not exist, the supplementary right of self-help does not exist either. To argue that to hold police action invalid will bring about "lawful" self-help is inherently contradictory. If the arrest would be unlawful, as we argue here, the use of self-help would also be unlawful. And if a State, by judicial decision or legislative fiat, purported to expand the law of self-help to embrace the instant situation, it would, "ingeniously or ingenuously", be circumventing the prohibition against removal of patrons by the police on racial grounds. *Cooper* v. *Aaron*, 358 U. S. at 17.

The court below having summarily decided important constitutional questions against petitioners in a manner which conflicts with decisions of this Court condemning state enforcement of private discrimination, certiorari should be granted to review its decision.

III

Virginia Denied Petitioners The Equal Protection Of The Laws And Deprived Them Of Their Liberty Without Due Process Of Law By Compelling Them To Stand Trial Before An Unconstitutionally Selected Jury And A Biased Judge In A Segregated Courtroom.

We have indicated in our discussion of the first two questions presented in this petition that Virginia's application of its trespass law to these petitioners denied them substantive rights guaranteed by the Fourteenth Amendment. If certiorari is granted in connection with these questions, and if our contentions with respect to them are correct, petitioners' convictions must be reversed and the indictments dismissed. But even if this Court rejects those contentions, we believe that certiorari should be

[23] See Schwelb, 36 N. Y. U. L. Rev. at 800-804, for an extensive discussion of the problems of "self-help" in the context of the sit-ins.

granted and that petitioners should have a new trial because they were denied the fair jury, fair judge and neutral judicial atmosphere required by the Fourteenth Amendment and by the decisions of this Court.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U. S. 133 (1955). To meet the standards of the Fourteenth Amendment, the State must provide a panel of "impartial, indifferent jurors," *Irvin* v. *Dowd*, 366 U. S. 717 (1961); an impartial judge, *Tumey* v. *Ohio*, 273 U. S. 510 (1927), *Payne* v. *Lee*, 222 Minn. 269, 24 N. W. 2d 259, 263-264 (1946), and a neutral judicial atmosphere, *Irvin* v. *Dowd*, *supra*, *Moore* v. *Dempsey*, 261 U. S. 86 (1923). The trial which Virginia afforded these petitioners met none of these requirements.

Going first to the impartiality of the jury, it is axiomatic that the systematic exclusion of Negroes from a petit jury trying Negro defendants violates the equal protection clause of the Fourteenth Amendment. *Avery* v. *Georgia*, 345 U. S. 559 (1953). Moreover, refusal by the Court to hear evidence in support of an allegation of systematic exclusion constitutes a denial of equal protection. *Carter* v. *Texas*, 177 U. S. 442 (1900). When petitioners' counsel sought to offer such proof, the court summarily dismissed his attempt:

> "I don't know what you are talking about. If you mean on the list of jurors selected by the Jury Commission the list indicates the white men, the colored men, the white women, the colored women, that is a fact; no evidence need be taken." (T. 11-12).

The racial markings on the list of jurors were made pursuant to an order of the court:

> "Following the instructions of the Court as to their duties they were to perform, [the Jury Commission]

listed white men in one list, white women in one list, colored men in one list and colored women in another list." (T. 30).

In *Avery* v. *Georgia, supra*, this Court held that a substantially identical kind of arrangement (white tickets for white jurors, yellow tickets for Negroes) constituted a *prima facie* case of discrimination in the selection of the jury. "When a prima facie case of discrimination is presented, the burden falls, forthwith, upon the State to overcome it." 345 U. S. at 563. In the case at bar, the state failed to come forward with any evidence whatever. Consequently, systematic exclusion of Negroes is established and requires the reversal of the convictions below.

Further curtailment of petitioners' right to an impartial, indifferent jury occurred in connection with the examination of the jurors on voir dire. Petitioners' counsel sought to ask potential jurors a series of fifteen questions respecting their qualifications (T. 16), including a question as to their membership in the White Citizens' Council, The Defenders of State Sovereignty, and the Ku Klux Klan (T. 20). The court did not permit any of these questions and simply asked the jurors, in conclusory terms, whether they could give petitioners a fair trial (T. 7-9). The only juror who asked to be disqualified did so—ironically—because he belonged to a municipal interracial organization (T. 9).

We submit that the constitutional right to a neutral jury is meaningless if it is not accompanied by a constitutional right to conduct a reasonable investigation into potential jurors' prejudices. See *Irvin* v. *Dowd, supra*. Even where no racial dispute is involved, it has been held to be reversible error in a long line of cases to refuse to permit questions on voir dire examination, asked in good faith, as to membership in the Ku Klux Klan or White Citizens Council. *Smith* v. *United States*, 262 F. 2d 50 (4th Cir. 1958). This case, like all sit-in cases, had a tendency to

arouse strong emotions of a racial nature and it is a reasonable inference that membership in a white supremacist organization would be likely to prejudice the potential juror aginst participants in anti-segregation demonstrations:

> "• • • [S]trong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute sufficient objection to him." Chief Justice Marshall in Burr's Trial, 1 Burr Trial 416 (1867) quoted in *Reynolds* v. *United States*, 98 U. S. 245 (1879), and more recently in *Irvin* v. *Dowd*, *supra* at 722.

Yet the barring of questions on voir dire with respect to membership in white supremacist organizations not only made it impossible for petitioners to challenge members of such organizations for cause, but also prevented them from making effective use of their peremptory challenges. The jurors' conclusory affirmations that they could try the case fairly were of little significance when the Court foreclosed inquiry into the critical facts behind those conclusions. *Irvin* v. *Dowd*, 366 U. S. at 723. Petitioners grant they have "no constitutional right to friends on the jury" (*Fay* v. *New York*, 332 U. S. 261, 289), but they claim a correlative constitutional right not to be tried by their enemies.

(2) Another element of Virginia's denial of petitioners' constitutional right to an impartial tribunal was the constant hostility exhibited by the judge towards petitioners and their counsel in the presence of the jury. Perhaps the most glaring examples of this hostility occurred on the occasions when petitioners' counsel sought to raise constitutional defenses. When counsel sought to challenge the constitutionality of identifying potential jurors' race, the court held him in contempt:

> "I am thinking you are in contempt of court because the court is neither aiding nor blocking the adminis-

> tration of justice * * * Now for you to cast that type of aspersion upon this court and its conduct, you are in contempt of Court. I will not now fix the punishment for that contempt but will do that later." (T. 13).

The judge again held petitioners' counsel in contempt (and again postponed punishment until the end of the trial) when counsel moved for an order ending all segregation in the courtroom and asked the judge to disqualify himself upon his denial of the motion (T. 15). On another occasion, the judge rebuked counsel for reasserting constitutional defenses, remarking that "I don't know where you studied law" (T. 106), and on still another suggested that counsel's attempts to question potential jurors on voir dire were "captious" (T. 18).

Petitioners submit that a fair trial is impossible where the court permits the threat of a contempt citation to hang over counsel's head for the assertion of reasonable and meritorious constitutional defenses. Aside from the threat of punishment to himself, counsel must necessarily wonder whether, by asserting these defenses, he is annoying the court to the detriment of his clients. Moreover, it is hardly possible for the jury not to be influenced by the judge's constant rebuking of one of the attorneys. In the instant case, a reading of the entire record reveals that the judge rebuked or chided petitioners' counsel almost every time he spoke, often in the most discourteous language; for example, "I don't want to hear any more from you" (T. 75). See also the judge's examination of one petitioner at T. 97, 98-100, 103-105.

In *Offutt* v. *United States*, 348 U. S. 11, 13 (1954), Mr. Justice Frankfurter, speaking to the very problem posed here, said that courts have the duty

> "to safeguard two indispensable conditions to the fair administration of justice: (1) counsel must be protected in the right of an accused to 'fearless,

> vigorous and effective advocacy, no matter how unpopular the cause in which it is employed, (2) equally so will this court 'protect the processes of orderly trial, which is the supreme object of the lawyer's calling.'"

The judge presiding at petitioners' trial clearly transgressed these standards, with the inevitable consequence that his bias toward petitioners' counsel was cast by the jury upon the petitioners themselves.

(3) Petitioners were also denied an impartial tribunal by being compelled to stand trial in a segregated courtroom. In response to counsel's attempt to establish for the record that the courtroom was in fact segregated, the trial judge said:

> "This Court seats people in the Court-Room in seats designated and in order to preserve quiet and general Court Room decorum, and in addition to prevent disorder among spectators, it has seats for colored persons and seats for white persons." (T. 11)

The judge again defended racial segregation in the courtroom at T. 14 and T. 20. Moreover, signs in all parts of the courthouse designated separate toilet and other facilities for whites and Negroes.

It is now firmly settled that segregation constitutes racial discrimination, *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and that the State may not justify such discrimination on the pretext of preventing disorder. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Nor can it be doubted that the segregation in the courtroom which the judge refused to terminate, was "state action." *Shelley* v. *Kraemer*, *supra*. The only question is whether this plainly unconstitutional arrangement operated against the

petitioners as well as against unlawfully segregated Negro spectators.[24]

We submit that it is impossible for a Negro to receive a fair trial in a segregated courtroom, probably in any case, and certainly, as here, where segregation at lunch counters was itself on trial. The rationale of the *Brown* decision, *supra*, was that segregation of the races imposes a status of inferiority upon Negroes. This is true not only in schools but also in a myriad of other activities. See *Gayle* v. *Browder*, 352 U. S. 903 (1956) (buses); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955) (golf courses); *State Athletic Commission* v. *Dorsey*, 359 U. S. 533 (1959) (athletic events); *Bailey* v. *Patterson*, 30 U. S. L. Week 4164 (U. S. Feb. 26, 1962) (transportation). Courtroom segregation under the aegis of the court itself places the stamp of official approval upon this badge of inferiority, and must inevitably affect the jurors' attitude towards Negro defendants, witnesses and attorneys, and their assessment of the culpability (or degree of culpability) of a "trespass" designed to combat segregation at lunch counters. Even if, as the court repeatedly ruled, the racial motivation of petitioners' exclusion from the lunch counter was not to be considered by the jury (T. 75), it was the jury's function to determine punishment. By conducting the trial in a segregated courtroom, Virginia in effect told the jury that the lunch counter segregation which petitioners had challenged was proper and in accordance with state policy. It is impossible to determine to what extent the finding that petitioners were guilty—and the punishment to which they were sentenced—were affected by this stamp of approval which Virginia gave to the practice of segregation of the races.

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[24] While a party's constitutional rights must ordinarily be asserted by that party, there is authority for the proposition that under the unusual circumstances of this case, the spectators' constitutional rights may be asserted by petitioners. See *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Bailey* v. *Patterson*, 30 U. S. L. Week 4164 (U. S. Feb. 26, 1962).

We believe that each one of the above departures from the constitutional guarantee of a fair tribunal constitutes sufficient ground for reversal of petitioners' convictions, and that the totality of circumstances rendered the proceedings so fundamentally unfair as to constitute a denial of due process of law. In any event, the issues presented by the denial of petitioners' motions, particularly those respecting the questions to jurors about their affiliations with white supremacist groups and the challenge to the segregated courtroom, present novel constitutional questions of overriding importance, common to thousands of trials of Negroes in many parts of the country, which have not yet been, but should be resolved by this court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of October, 1961.

The petition of Virgil A. Wood for a writ of error and supersedeas to a judgment rendered by the Corporation Court for the City of Lynchburg on the 6th day of April, 1961, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

Office-Supreme Court, U.S.
FILED
MAY 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 79

VIRGIL A. WOOD, ET AL.,
Petitioners

v.

COMMONWEALTH OF VIRGINIA,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1961

No. 778

VIRGIL A. WOOD, ET AL.,

Petitioners

v.

COMMONWEALTH OF VIRGINIA,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

"In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate dis-

placement by the will of the people except at too slow a pace. * * *

"Our right to pass on the validity or legislation is now too much a part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court, should be indifferent to public temper and popular wishes. * * * A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

FRANKFURTER, J. concurring

American Fed. of Labor v.
American Sash & Door Co.,

335 U.S. 538, 555-557

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated April 16, 1962, the Attorney General of Virginia was requested to file a

response to the petition for writ of certiorari in the instant case.* In accordance with the request contained in the above mentioned communication; written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

PRIOR PROCEEDINGS

On April 6, 1961; petitioners were convicted in the Corporation Court of the City of Lynchburg for violation of Section 18.1-173 of the Code of Virginia (1950) as amended. Their punishment was fixed at one hundred dollars fine and ninety days in jail. A petition for writ of error to the judgment of the Corporation Court was denied by the Supreme Court of Appeals of Virginia on October 12, 1961; and the cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by petitioners on March 7, 1962.

STATEMENT OF FACTS

On February 13, 1961; and February 21, 1961, petitioners entered the premises of the Patterson Drug Store in Lynchburg, Virginia, and attempted to obtain service at certain eating facilities therein (Tr. 41, 42, 46-47, 48).** All of the petitioners were refused service at these facilities and were asked to leave the premises. (Tr. 42, 44, 57). This request was made by the Vice-President of the Patterson Drug Company, Inc., the private corporation which owns and operates the Patterson Drug Store, after that official had introduced himself to the petitioners and explained his position with the company (Tr. 43, 65, 67-68). Petitioners

* Post, Appendix A.

**All references (Tr.) are to pages in the typewritten transcript.

refused to leave the premises although they were advised by the company official, and by a police officer who had been summoned to the scene, that they would be arrested if they did not do so (Tr. 44, 46, 69-71, 92, 94). When petitioners persisted in their refusal, they were arrested for trespassing in violation of Section 18.1-173 of the Virginia Code (Tr. 44, 51, 69-71).

THE STATUTE

Under attack in the instant case is Section 18.1-173 of the Code of Virginia (1950) as amended, which provides:

> "If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.
>
> "This section shall not be construed to affect in any way the provisions of §§29-165 to 29-170."

QUESTIONS PRESENTED

1. Does Section 18.1-173 of the Virginia Code, as applied to petitioners in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

2. Did certain aspects of the trial infringe rights guaranteed petitioners by the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

Section 18.1-173 of the Virginia Code, as Applied to Petitioners in the Case at Bar, Does Not Contravene the Fourteenth Amendment to the Constitution of the United States.

Section 18.1-173 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934. Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments, the language of the instant statute is substantially identical to that contained in the original enactment. As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever. *The statute does not purport to be, and is not, a racial segregation law.* It forbids trespass by anyone—whether he be a member of a racial minority or not—in going upon or remaining upon the private property of another when he is not welcome.

That the enactment in question is not a racial segregation law and has no racial connotation is conclusively established by the decision of this Court in *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369, *app. dism.* 335 U. S. 875, *reh. den.* 335 U. S. 912. In that case the Court held that the statute, as applied to a member of the sect of Jehovah's Witnesses who refused to leave the premises of a private building after proper warning, was not violative of the right to freedom of speech, press, assembly or worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Sections 12 and 16 of the Constitution of Virginia. Commenting upon the effect of the statute, the Court observed (188 Va. at 76-77):

> "The language of the statute is clear and unambiguous. Its provisions may be invoked only when a person

has unlawfully entered or has remained upon the premises after he has been forbidden so to do by one lawfully in charge or in possession. . . . The only purpose of this law is to protect the rights of the owners or those in lawful control of private property.

* * *

"We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

Equally manifest is it that invocation of the statute under the circumstances of the case at bar impairs no constitutional right of the petitioners. The record undeniably demonstrates that the petitioners were not arrested because of their race or color, but solely because they refused to leave the premises of a privately owned and operated drug store when requested to leave and persisted in remaining upon such premises after having been forbidden to do so.

Under such circumstances, resort by a private individual or corporation to the protection of a statute imposing criminal sanctions for continued trespass upon private property after proper warning presents no question whatever of conflict with the Fourteenth Amendment. Within the past five years the argument advanced by petitioners in the case at bar has been urged in various jurisdictions and uniformly rejected. See, *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. (2d) 295; *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 268 F. (2d) 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, *aff'd. per curiam* 4 Cir., 284 F. (2d) 746; *Griffin* v. *Collins*, 187 F. Supp. 149; *State* v. *Avent*, 253 N.C. 580, 118 S.E. (2d) 47; *Drews* v. *Maryland*, 224 Md. 186, 167 A (2d) 341; *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S.E. (2d) 817; *Griffin* v. *Maryland*, 225

Md. 442, 171 A (2d) 717; *Henderson* v. *Trailway Bus Co.*, 194 F. Supp. 423. Observations of the various judicial tribunals in certain of these cases are sufficiently significant to merit reproduction in the body of this brief.

In *State* v. *Clyburn, supra,* the Supreme Court of North Carolina—in a situation identical to that under consideration in the case at bar—sustained the conviction of a Negro who had been charged with unlawfully entering upon the lands of another after having been forbidden to do so and unlawfully refusing to leave that portion of the premises reserved for members of the opposite race. In that case, the defendant and other Negroes had entered the business premises of certain proprietors who were engaged in retailing ice cream and sandwiches and who operated their facility on a racially segregated basis.

Pointing out that North Carolina law imposed criminal penalties for interfering with the possession or right of possession of real estate privately held, that the possessor might accept or refuse whomsoever he pleased and for whatever whim suited his fancy and that race conferred no prerogative upon the intruder nor impaired his defense, the Supreme Court of North Carolina declared (101 S.E. (2d). at 299):

> ". . . the Supreme Court of the United States said in Shelley v. Kraemer, 334 U.S. 1; 68 S. Ct. 836, 842, 92 L.Ed. 1161, 3 A.L.R. 2d 441: 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, *the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory*

or wrongful.' This interpretation has not been modified: Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253; District of Columbia v. Thompson Co., 346 U.S. 100, 73 S. Ct. 1007, 97 L.Ed. 1480; Williams v. Yellow Cab Co., 3 Cir. 200 F. 2d 302, certiorari denied; Dargan v. Yellow Cab Co., 346 U.S. 840, 74 S. Ct. 52, 98 L.Ed. 361.

* * *

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens County Jockey Club, 269 N.Y. 249, 72 N.E. 2d 697, 1 A.L.R. 2d 1160; Terrell Wells Swimming Pool v. Rodriguez Tex. Civ. App., 182 S.E. 2d 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589, 24 L.R.A., N.S., 447; Younger v. Judah, 111 Mo. 303, 19 S.W. 1109; Goff v. Savage, 122 Wash. 194, 210 P.374; De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d 651; Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N.E. 2d 574; Coleman v. Middlestaff, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N.E. 2d 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S.E. 2d 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." (Italics supplied)

In *Williams* v. *Howard Johnson's Restaurant, supra,* a Negro who had been denied service in a Howard Johnson's Restaurant located in Alexandria, Virginia, because of his race instituted suit for a declaratory judgment and injunctive relief, contending that his exclusion from the restaurant in question upon racial grounds violated rights secured to

him by the Constitution and laws of the United States. Sustaining the dismissal of petitioner's complaint by the United States District Court for the Eastern District of Virginia as being "in accord with the decisions of the Supreme Court of the United States and other Federal courts," Judge Soper—speaking for the United States Court of Appeals for the Fourth Circuit—observed (268 F. (2d) at 847):

> "The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the States from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the State which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiesence of the State in these practices amounts to discriminatory State action which falls within the condemnation of the Constitution. The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.
>
> *"This argument fails to observe the important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of State law they do not furnish a basis for the pending complaint.*

* * *

"The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in *Shelley* v. *Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842, 92 L. Ed. 1161:

> "'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" (Italics supplied)

Griffin v. *Collins, supra*, involved a class action for injunctive relief to prevent the arrest for trespass of Negroes who might visit the Glen Echo Amusement Park in Montgomery County, Maryland, in opposition to the all-white policy of its owner and operator. Plaintiffs were Negroes who had been arrested, or threatened with arrest, for trespass upon the premises of the privately owned and operated amusement park. They sought an adjudication declaring that the acts of the owner and operator of the amusement park "in utilizing governmental authority and powers of the State and the sanctions of State law to aid, support and enforce the denial to plaintiffs, solely because of their race, of admission to Glen Echo Park and enjoyment of its facilities" violated plaintiff's rights under the Constitution of the United States. *Griffin* v. *Collins, supra* at 152.

Holding that the arrest of Negro trespassers by police officers of the State of Maryland—in response to the request of an amusement park proprietor for police assistance in enforcing such proprietor's policy of excluding Negroes—did not constitute State action in violation of the Due

Process and Equal Protection clauses of the Fourteenth Amendment, the Court observed (187 F. Supp. at 153-154):

> "The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 1947, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161. Cf. Dawson v. Mayor & City Council of Baltimore, 4 Cir., 1955, 220 F. 2d 386, affirmed 350 U. S. 877, 76 S. Ct. 133, 100 L. Ed. 774.
>
> "Plaintiffs concede the right of the corporate defendants, as owners and operators of Glen Echo Park, to serve or refuse to serve whomever they please, and concede that said defendants, like other property owners or operators of a private business, may use 'self-help' to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, *that if the proprietor of a business calls a police officer,* deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity and (2) deprive the Negro of his rights under 42 U.S.C.A. §§ 1981 and 1983.
>
> *"Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend that the*

proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights." (Italics supplied)

In *Henderson* v. *Trailway Bus Company, supra*, plaintiffs sought to enjoin the enforcement of Section 18.1-173 of the Virginia Code (the very enactment challenged in the instant case) upon the ground that the statute, as applied to "sit-in" demonstrations, was violative of the Fourteenth Amendment to the Constitution of the United States. Rejecing this contention and dismissing the complaint, the three-judge District Court (Boreman, Circuit Judge, and Lewis and Bryan, District Judges) observed (194 F. Supp. at 426):

> "But, in any event, the critical factor is that the statutes apply only to places where a person goes 'without authority of law,' meaning property not at the time affected with a public interest. *Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use. Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 1959, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System*, 4 Cir., 1960, 284 F. 2d 746. *Assurance of this right is the entire and sole aim of the two code provisions before us. Hall* v. *Commonwealth, supra*, 188 Va. 72, 49 S. E. 2d 369, 371. In there sustaining the statute the Virginia Court relied in part upon *Martin* v. *City of Struthers*, 319 U.S. 141, 147, 63 S. Ct. 862, 865, 87 L. Ed. 1313, where Justice Black said:
>
> 'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General tres-

> pass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. * * *' " (Italics supplied)

So far as counsel for the Commonwealth are aware, there has been no decision—State or Federal—at variance with the views expressed in the above mentioned cases. In light of these decisions, the Commonwealth submits that the constitutional validity of the Virginia statute under attack in the case at bar has been so thoroughly well settled by such a unanimity of judicial opinion that no really serious assertion of antagonism to the Fourteenth Amendment can be made. In this connection, certain fundamental similarities shared by these decisions are immediately apparent. Initially, it should be noted that each of these cases was decided the same way, and each decision was rendered by a unanimous court. *Not one dissenting judicial voice is heard.* Obviously, none of the tribunals in question experienced any difficulty in ascertaining the applicable law governing the case before it, and none hesitated to declare the rights of the parties in accordance with that law. Moreover, in each of these cases, decisions of the Supreme Court of the United States were relied upon to establish the central constitutional principle involved, i.e., that the Fourteenth Amendment to the Constitution of the United States has nothing whatever to do with the racially selective practices of private individuals and does not prohibit invocation of State enforced trespass statutes to protect individuals exercising their right to discriminate. Of particular significance is the fact that the individual court considering each of these cases stressed the decision of the United States Supreme Court in *Shelley* v. *Kraemer*, 334 U. S. 1, as supportive of its disposition of the case before it in a manner diametrically opposed to the contention of petitioners in the case at bar.

Clearly this Court has settled beyond question for more than three-quarters of a century that the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the States, that the Fourteenth Amendment erects no shield against merely private conduct and that actions carried out by the people of a State in accordance with their own desires or social practices do not constitute actions of the State. *Civil Rights Cases,* 109 U. S. 3; *Shelley* v. *Kraemer, supra.* Counsel for the Commonwealth respectfully submit, therefore, that the case at bar does not even present a judicial—much less a substantial federal—question.

II.

No Aspect Of The Trial Infringed Rights Guaranteed The Petitioners By The Fourteenth Amendment To the Constitution Of The United States.

Under the Virginia law the jury lists for each year are prepared by jury commissioners (not less than two nor more than five) who are appointed by the Judge of the Circuit Court of each county and city, and who are required to be citizens of intelligence, morality and integrity. Before entering upon the discharge of their duties, the commissioners thus appointed subscribe an oath that they will honestly and without prejudice perform their duties as jury commissioners, that they will select none but persons they believe to be of good repute for honesty and intelligence and that in all their selections they will endeavor to promote only the impartial administration of justice. These commissioners then prepare a list (containing not less than 100 nor more than 300 names, with certain specific exceptions) of such inhabitants of the county or city as are well qualified to serve as jurors and not otherwise excluded or exempt by statute. The names on this list are written upon separate ballots, so

folded that they will resemble each other as nearly as possible, and the ballots are then placed in a box in the custody of the court. It is from this source that the names appearing in the *venire facias* are drawn, in the presence of the Judge of the Court, or, in his absence, in the presence of one of the commissioners in chancery and a reputable citizen. From the persons summoned to appear, a panel of eleven is selected in cases of misdemeanors, from which panel each side strikes three names. The remaining five persons constitute the jury for the trial of the accused. Sections 8-180, 8-181, 8-182, 8-184, 19.1-206 and 19.1-208, Code of Virginia (1950) as amended.

With specific reference to the placing of names of prospective jurors in the ballot box and the drawing of names therefrom, Sections 8-184 and 8-188 of the Virginia Code, in pertinent part, provide:

> "§ 8-184.—When such list is made out, the commissioners shall cause all the names thereon to be fairly written, each on a separate paper or ballot, *and shall so fold or roll up the ballots that they will resemble each other as nearly as may be and the names written thereon will not be visible on the outside*, and shall deposit the ballots with the list in a secure box prepared for that purpose. Such box shall be locked and safely kept by the clerk of such court and opened only by the direction of the judge thereof, as hereinafter provided."

> "§ 8-188.—The clerk shall openly draw from such jury box in the clerk's office. *After shaking and mixing together the ballots in such box, in any case in which the jury shall consist of five persons eleven ballots shall be drawn and in all other cases thirteen ballots shall be drawn without inspecting the names written on any until the proper number is drawn and thereupon the names shall be listed by the clerk*, and he shall forth-

with issue and deliver a writ of venire facias to the proper officer of the county or city requiring him to summon the persons thus drawn, whose names shall be stated in the writ, together with the day of the term and the court at which their attendance is required; . . ." (Italics supplied).

In the case at bar, it appeared that the list prepared by the jury commissioners indicated "the white men, the colored men, the white women, the colored women, . . ." (Tr. 12). It did *not* appear, *nor did defense counsel seek to establish,* that any racial designation appeared on the separate ballots upon which the names of prospective jurors were written before deposit of such ballots in the ballot box, or that there was any distinguishing feature whatever in the ballots placed in such box, or that there was any departure from the directives enunciated in the above-quoted statutes. Clearly, the situation presented in the instant case is not even remotely similar to that which obtained in *Avery* v. *Georgia,* 345 U. S. 559, in which case the names of white jurors were listed on white ballots and the names of Negro jurors were listed on yellow ballots.

Nor did the refusal of the trial court to permit defense counsel to question prospective jurors concerning their possible membership in the White Citizens Council, the Defenders of State Sovereignty, or the Ku Klux Klan infringe any constitutional right of the petitioners. The record discloses that the specific question under discussion was not an isolated inquiry, but was one of a series of fifteen interrogatories, drawn up by defense counsel, which were considered in open court by the trial judge and found to be either irrelevant or repetitive. In light of the exhaustive examination of the prospective jurors conducted by the trial court (Tr. 6-9), it cannot be said that the trial court's de-

termination, i.e., that the questions sought to be propounded by defense counsel were cumulative, constituted an improper exercise of judicial discretion.

With respect to the action of the trial court in citing defense counsel for contempt (Petition for Writ of Certiorari, p. 25), the record reveals that the following situation occurred (Tr. 13-14):

> "MR. HOLT: . . . We feel that denial of due process, for the Court to assist anyone in, is perhaps expressing such a prejudice.
>
> "THE COURT: I am thinking you are in contempt of Court because the Court is neither aiding nor blocking the administration of justice handed to all persons. In addition to that, this Court told you in advance of trial that if you wanted to obtain a list of the venire of this Court, you could do so, and I think you did obtain it. Now for you to cast that type of aspersion upon this Court and its conduct, you are in contempt of Court. I will not now fix the punishment for that contempt but will do that later.
>
> "MR. HOLT: May it please the Court, may the record indicate that if I said the word 'court', I have reference to those individuals who prepare the jury list.
>
> "THE COURT: That is not what you said nor does the Court believe that is what you meant."

Moreover, in regard to the trial court's colloquy with defense counsel concerning the latter's continual reassertion of constitutional defenses, the record discloses (Tr. 105-106):

> "MR. HOLT: May it please the Court, at this time the defense of the eleven individuals who are individually charged rests, and we request an opportunity to

renew all motions heretofore made, including the motion for striking of evidence and directing a verdict.

"THE COURT: What is your object in continually making the same motion over and over after the Court has ruled on it?

"MR. HOLT: Your Honor, as we have been taught law, we have been taught, sir, that you always press for your Constitutional Rights and constantly renew them for the reason that if you don't, if an appeal becomes necessary, then you will been deemed to have waived them by virtue of not renewing them.

"THE COURT: I don't know where you studied law. It is not the law of Virginia. It is not befitting, after a Court has considered and passed and ruled on motions, to keep on eternally asking again and again and again that the Court reconsider."

Counsel for the Commonwealth submit that even the most cursory comparison of these isolated differences between the trial court and defense counsel in the case at bar with the protracted and violent animosity which prevailed in *Offutt* v. *United States*, 348 U. S. 11, will establish the ephemeral character of this contention of petitioners.

Finally, counsel for the Commonwealth submit that petitioners' assertion that the action of the trial court in racially separating the *spectators* in the courtroom infringed constitutional rights of the *defendants* is wholly without merit. *Wells* v. *Gilliam*, 196 F. Supp. 792; *cf.*, *Dawley* v. *City of Norfolk*, *4 Cir.*, 260 F. (2d) 647, *cert. den.* 359 U. S. 935.

CONCLUSION

For the foregoing reasons, counsel for the Commonwealth submit that Section 18.1-173 of the Virginia Code, as applied to the petitioner in the case at bar, presents no

question whatever of conflict with the Fourteenth Amendment to the Constitution of the United States, that no aspect of petitioners' trial violated rights guaranteed them by the Fourteenth Amendment and that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia.

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES,
WASHINGTON 25, D. C.

April 16, 1962

The Honorable Robert Y. Button
Attorney General of Virginia
Richmond, Virginia

RE: WOOD, ET AL. v. VIRGINIA

No. 778, October Term, 1961

Dear Sir:

A petition for writ of certiorari was filed in this Court on March 7, 1962 in the above-entitled case, and my records indicate that you were served with copies.

I have been directed by the Court to request that you file a response to such petition. Your response should be printed and 40 copies, with service, should reach this office by May 15, 1962.

Very truly yours,

JOHN F. DAVIS, *Clerk*

By E. P. CULLINAN *S/*
E. P. CULLINAN
Chief Deputy

EPC: jmh
cc: Melvin L. Wulf, Esquire
156 Fifth Avenue
New York 10, N. Y.